

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

**THE CINCINNATI SPECIALTY  
UNDERWRITERS INSURANCE  
COMPANY,**

**Plaintiff,**

**VS.**

**CASA BLANCA LOFTS CONDOMINIUM  
ASSOCIATION,**

**Defendant.**

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**Civil Action No.: 5:23-CV-1077**

**PLAINTIFF’S ORIGINAL COMPLAINT FOR DECLARATORY RELIEF**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COMES THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY (“CSU” or the “Plaintiff”), Plaintiff in the above-entitled and numbered cause, and petitions this Court pursuant to the FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. §§2201 *et seq.* and Rule 57 of the FEDERAL RULES OF CIVIL PROCEDURE for consideration and a declaration of the parties’ respective rights and/or obligations under a commercial general liability insurance policy issued by CSU to its named insured Uptown Downton, LLC (“Uptown Downton” or the “Insured”). Specifically, CSU seeks a declaratory judgment with respect to its obligation to indemnify Uptown Downton, in connection with a liability lawsuit entitled: Cause No.: *Casa Blanca Lofts Condominium Association v. Uptown Downton, LLC and Daly Construction, LLC*, Cause No. 2020CI16321, filed in the 45th District Court of Bexar County, Texas (the “Underlying Lawsuit”). The Underlying Lawsuit was filed by Defendant, Casa Blanca Lofts Condominium Association alleging damages from construction defects from the work performed by Uptown Downton and other contractors at the Casa Blanca Condominiums, located at 1542 North Alamo

Street, San Antonio, Texas 78215 (the “Property”). In support of CSU’s Original Complaint for Declaratory Relief, CSU would respectfully show the Court as follows:

**I.**  
**PARTIES**

1. Plaintiff CSU is a foreign insurance company duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of Ohio, and doing business in the State of Texas. CSU is a citizen of the State of Ohio.

2. Defendant, Casa Blanca Lofts Condominium Association (the “Association” or the “Defendant”) is a domestic non-profit corporation, organized and existing under and by virtue of the Texas Non-Profit Act (Texas Business Organizations Code, Section 22.001, et seq.). The Defendant may be served by its registered agent, Somerset Association Management, Inc. located at 5401 N. Central Expressway, Suite 220, Dallas, Texas 75205.

**II.**  
**JURISDICTION AND VENUE**

3. This declaratory judgment action is brought under 28 U.S.C., §§ 2201 *et seq.* and Rule 57 of the FEDERAL RULES OF CIVIL PROCEDURE, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully set forth. The jurisdiction of this Court is proper under 28 U.S.C. § 1332, based upon the diversity of citizenship between Plaintiff CSU – a citizen of Ohio and the Defendant Association – a citizen of Texas. Jurisdiction of this Court is also proper under 28 U.S.C. § 1332 because the damages sought in the Underlying Lawsuit are in excess of \$1,000,000, which exceeds the Court’s \$75,000.00 requirement for an amount in controversy.

4. Venue is properly maintained in this Court pursuant to 28 U.S.C. § 1391(b)(1)(2), as the judicial district is where the Property that is the subject of this suit is located, and where a

substantial part of the events giving rise to this action for declaratory relief occurred.

### **III.**

#### **FACTUAL BACKGROUND AND THE UNDERLYING LAWSUIT**

5. On or around August 26, 2020, the Association filed its Original Petition in the Underlying Lawsuit alleging damages as a result of construction defects to the Property. Uptown Downtown was not a defendant in the Original Petition until the Association amended its pleading. On March 5, 2021, the Association filed its First Amended Petition (the “Petition”) naming Uptown Downtown as a defendant. *See Exhibit A.*

6. Specifically, the Association alleged various defects and damages resulting from Uptown Downtown and several other defendants’ acts and/or omissions. The Association asserted claims of negligence, negligence *per se*, and breach of implied warranty against the Insured. The Association also sought actual damages for repairs to the Property, exemplary damages, attorneys’ fees, litigation costs, and pre-judgment and post-judgment interest. *See id.* CSU is currently defending Uptown Downtown in the Underlying Lawsuit pursuant to a Reservation of Rights.

7. A copy of the Petition is attached hereto as **Exhibit A**, which states in part:

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#### **V. Factual Background**

7. The Defendants jointly provided construction services for the Project.

8. As the general contractor for the project, Uptown [Downtown] failed to fulfill its legal obligations to oversee the work performed by and through its subcontractors who performed the work on behalf of Uptown [Downtown]. These acts and omissions on the part of Uptown [Downtown] have resulted in numerous defects and resulting damages which include, but are not limited to:

- Elevated walkways and balconies indicate water intrusion and moisture intrusion, as well as structural distress;
- The “skylight” openings as well as the integration with the building envelope and drainage outfall the edges;

- The slope and drainage of the elevated walkways are insufficient and allows for water intrusion and accelerated distress of structural framing members;
- The basement storage area exhibits signs of water intrusion and potential bio growth;
- The flashing systems and water management systems employed are ineffective and resulting in water damage;
- The building envelope system on the exterior walls is made up of stucco system that has inadequate clearance to hard surfaces at the elevated walkways and lack of a functioning through-wall flashing system to adequately weep moisture out of the system;
- The roof has several areas of ponding water indicating an improper and/or inadequate slope.

8. All work related to the Project has been completed and all post-completed damages are a result of the work performed by and through the subcontractors on Uptown [Downtown]'s behalf.

9. The Association's Property may be restored to use by repair, replacement, adjustments or removal of the faulty work product performed by and through the subcontractors on Uptown [Downtown]'s behalf.

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**Exhibit A**, attached hereto.

#### **IV.**

#### **INSURANCE PROVISIONS MADE THE BASIS OF THIS ACTION**

8. CSU issued a Commercial Package Policy, bearing policy number CSU 004 12 84, to Uptown Downtown for the coverage period September 27, 2012 to September 27, 2013, which was subsequently renewed for the periods: September 27 to December 27, 2013; December 27, 2013 to February 15, 2014; and February 15, 2014 to April 1, 2014 (collectively the "Policy").

9. While the Policy lists the Property as a scheduled premises, the Policy contains several endorsements and exclusions that limit indemnity coverage owed to Uptown Downtown related to the Property. Some of the applicable terms and conditions that preclude coverage under the Policy - attached hereto as **Exhibit B**, are outlined below, stating in part:

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## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

...

### SECTION I – COVERAGES

#### COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. . . .

...

- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
  - (2) The “bodily injury” or “property damage” occurs during the policy period; and

...

- c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.
- d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;
  - (2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or
  - (3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.
- e. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury”.

...

## **2. Exclusions**

This insurance does not apply to:

### **a. Expected Or Intended Injury**

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

### **b. Contractual Liability**

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
  - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and
  - (b) Such attorneys’ fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...

**j. Damage To Property**

“Property damage” to:

...

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

**k. Damage To Your Product**

“Property damage” to “your product” arising out of it or any part of it.

**l. Damage To Your Work**

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

**n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) “Your product”;

(2) “Your work”; or

(3) “Impaired property”;  
if such product, work, or property is withdrawn or recalled from the market  
or from use by any person or organization because of a known or suspected  
defect, deficiency, inadequacy or dangerous condition in it.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**

**INDEPENDENT CONTRACTORS LIMITATIONS OF COVERAGE**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

**A. Section IV - Commercial General Liability Conditions** is amended to include the following language:

As a condition to and for coverage to be provided by this policy, you must do all of the following:

1. Obtain a formal written contract with all independent contractors and subcontractors in force at the time of the injury or damage verifying valid Commercial General Liability Insurance written on an “occurrence” basis with Limits of Liability of at least:
  - a. \$1,000,000 each “occurrence”;
  - b. \$2,000,000 general aggregate, per project basis; and
  - c. \$2,000,000 Products-Completed Operations aggregate.
2. Obtain a formal written contract stating the independent contractors and subcontractors have agreed to defend, indemnify and hold you harmless from any and all liability loss, actions, costs, including attorney fees for any claim or lawsuit presented, arising from the negligent or intentional acts, errors or omissions of any independent contractor and subcontractor.
3. Verify in the contract that your independent contractors and subcontractors have named you as an additional insured on their Commercial General Liability Policy for damages because of “bodily injury”, “property damage”, and “personal and advertising injury” arising out of or caused by any operations and completed operations of any independent contractor or subcontractor. Coverage provided to you by any independent contractor or subcontractor must be primary and must be provided by endorsement CG 20 10 (7/04 edition) and CG 20 37 (7/04 edition), or their equivalent. Completed operations coverage must be maintained for a minimum of two years after the completion of the formal written contract.



**This insurance will not apply to any loss, claim or “suit” for any liability or any damages arising out of operations or completed operations performed for you by any independent contractors or subcontractors unless all of the above conditions have been met.**

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**CONTRACTORS – CHANGES TO COMMERCIAL GENERAL LIABILITY  
COVERAGE PART**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

**EXCLUSION – BREACH OF CONTRACT**

- A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:**

This insurance does not apply to any claim for “bodily injury” or “property damage” arising directly or indirectly from breach of express or implied contract, including breach of an implied in law or implied in fact contract. This exclusion does not apply to liability for damages that an insured would have in the absence of the contract.

...

**LIMITATION OF COVERAGE TO SCHEDULED CLASSIFICATIONS ONLY**

This insurance applies only to "bodily injury", "property damage" or "personal and advertising injury" arising out of the operations which are classified and shown in the Commercial General Liability Coverage Part Declarations classification schedule.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**CHANGES TO COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

...

**EXCLUSION – PUNITIVE OR EXEMPLARY DAMAGES**

- A. The following exclusion is added to Paragraph 2., **Exclusions** of **Section I – Coverage A – Bodily Injury and Property Damage Liability** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal and Advertising Injury Liability**:

**2. Exclusions**

This insurance does not apply to:

Any claim of indemnification for punitive or exemplary damages. If a suit is brought against any insured for a claim covered by this Coverage Part, seeking both compensatory and punitive or exemplary damages, we will provide a defense to such action. However, we will not have an obligation to pay for any costs, interest, or damages, attributable to punitive or exemplary damages. If state law provides for statutory multiple damage awards, we will pay only the amount of the award before the multiplier is added.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION – NEW CONSTRUCTION FOR DESIGNATED HOUSING**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

- A. The following exclusion is added to Paragraph 2. **Exclusions** of **Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2. **Exclusions of Section I - Coverage B – Personal And Advertising Injury Liability**:

1. This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” caused by or arising out of, in whole or in part, either directly or indirectly, any work or operations related to any job or project involving “new construction” of:
  - a. “Multi-family housing”, intended for human habitation including common areas and appurtenant structures of those structures; or
  - b. “Tract homes” constructed in a “master planned community” or constructed in the same development.

Paragraph 1.a. of this exclusion does not apply to any multi-family housing unit consisting of four individual units or less in one building, if the building is not part of any planned development consisting of the same or similar type structures or “master planned community”.

Paragraph **1.b.** of this exclusion applies only when you or others on your behalf perform operations or work on ten (10) or more homes within one “master planned community” or housing development.:

**B.** For the purposes of this endorsement, the following definitions apply:

- 1.** “Tract homes” means homes or housing consisting of identical, nearly-identical or similar construction, design, style or floor plan constructed together:
  - a.** On a similar tract of land;
  - b.** In the same housing development; or
  - c.** In a “master planned community”.
- 2.** “Master planned Community” means a development built according to a plan that includes but is not limited to, residential homes, commercial buildings, educational facilities and community facilities.
- 3.** “Multi-family housing” means condominiums, townhouses, or similar housing where multiple residential units are joined to comprise one building or several buildings within a complex. “Multifamily housing” does not include apartment buildings owned by one entity where each unit is rented to others.
- 4.** “New construction” means the first or initial finish-out work to the interior or exterior of any building, structure or real property that has never been occupied. “New construction” does not include the repair, remodeling, renovation, maintenance, or modification of any occupied or previously occupied existing real property.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION – FUNGI OR BACTERIA**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

- A.** The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph **2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

**2. Exclusions**

This insurance does not apply to:

**Fungi or Bacteria**

- a.** “Bodily injury”, “property damage” or “personal and advertising injury” caused directly or indirectly, in whole or in part, by any actual, alleged or threatened:

...

- (3) Contact with;
- (4) Absorption of;
- (5) Exposure to;
- (6) Existence of; or
- (7) Presence of,

any “fungi” or bacteria on or within a building or structure, including its contents, whether occurring suddenly or gradually;

- b.** Any loss, cost or expense associated in any way with, or arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, mitigating or disposing of, or in any way responding to, investigating, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity;

- c.** Any liability, with respect to “fungi” or bacteria, arising out of, resulting from, caused by, contributed to, or in any way related to any supervision, instruction, recommendation, warning or advice given or which should have been given in connection with:

- (1) The existence of “fungi” or bacteria;
- (2) The prevention of “fungi” or bacteria;
- (3) The remediation of “fungi” or bacteria;
- (4) Any operation described in Paragraph **A.2.b.** above;
- (5) “Your product”; or
- (6) “Your work”; or

- d.** Any obligation to share damages with or repay any person, organization or entity, related in any way to the liability excluded in Paragraphs **A.2.a.**, **b.** or **c.** above;

regardless of any other cause, event, material, product and / or building component that contributed concurrently or in any sequence to the injury or damage.

However this exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for human ingestion.

- C. For the purposes of this endorsement, **SECTION V – DEFINITIONS** is amended to include the following:

“Fungi” means any type or form of fungus, and includes, but is not limited to, any form or type of mold, mushroom or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**LIMITATION OF COVERAGE TO SCHEDULED CLASSIFICATIONS ONLY**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

This insurance applies only to “bodily injury”, “property damage”, or “personal and advertising injury” caused by or arising out of the operations which are classified and shown in the Commercial General Liability Coverage Part Declarations classification section.”

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**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION – NEW CONSTRUCTION FOR DESIGNATED HOUSING**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

- A. The following exclusion is added to Paragraph 2. **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2. **Exclusions of Section I - Coverage B – Personal And Advertising Injury Liability**:

1. This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” caused by or arising out of, in whole or in part, either directly or indirectly, any work or operations related to any job or project involving “new construction” of:
  - a. “Multi-family housing”, intended for human habitation including common areas and appurtenant structures of those structures; or
  - b. “Tract homes” constructed in a “master planned community” or constructed in the same development.

Paragraph **1.a.** of this exclusion does not apply to any multi-family housing unit consisting of four individual units or less in one building, if the building is not part of any planned development consisting of the same or similar type structures or “master planned community”.

Paragraph **1.b.** of this exclusion applies only when you or others on your behalf perform operations or work on ten (10) or more homes within one “master planned community” or housing development.:

**B.** For the purposes of this endorsement, the following definitions apply:

1. “Tract homes” means homes or housing consisting of identical, nearly-identical or similar construction, design, style or floor plan constructed together:
  - a. On a similar tract of land;
  - b. In the same housing development; or
  - c. In a “master planned community”.
2. “Master planned Community” means a development built according to a plan that includes but is not limited to, residential homes, commercial buildings, educational facilities and community facilities.
3. “Multi-family housing” means condominiums, townhouses, or similar housing where multiple residential units are joined to comprise one building or several buildings within a complex. “Multifamily housing” does not include apartment buildings owned by one entity where each unit is rented to others.
4. “New construction” means the first or initial finish-out work to the interior or exterior of any building, structure or real property that has never been occupied. “New construction” does not include the repair, remodeling, renovation, maintenance, or modification of any occupied or previously occupied existing real property.

...

**Exhibit B** (emphasis added).

## **V. BASIS FOR DECLARATORY RELIEF**

10. CSU seeks a declaration from the Court that there is no duty to indemnify insured, Uptown Downtown in the Underlying Lawsuit. CSU contends that based on the express and unambiguous terms of the Policy, the following endorsements and exclusions preclude coverage

for the allegations asserted and the damages sought in the Underlying Lawsuit, namely: Damage to Property Exclusion, Damage to Your Product Exclusion, Damage to Your Work Exclusion, Damage to Impaired Property or Property Not Physically Injured Exclusion, Contractual Liability Exclusion, Breach of Contract Exclusion, New Construction for Designated Housing Exclusion, Limitation of Coverage to Scheduled Classifications, Independent Contractors Limitations of Coverage, Punitive and Exemplary Damages Exclusion, and the Fungi or Bacteria Exclusion. As the Association's allegations against insured, Uptown Downtown are for property damage and not other covered injuries under the Policy such as bodily injuries and/or advertising injuries, CSU contends that the above Policy endorsements and exclusions collectively preclude any indemnity owed to Uptown Downtown for any property damage as alleged in the Underlying Lawsuit. It is for these reasons, CSU respectfully requests that this Court issue a declaration that CSU owes no duty to indemnify the Insured for the claims asserted in the Underlying Lawsuit.

**VI.**  
**CONCLUSION**

**WHEREFORE, PREMISES CONSIDERED,** Plaintiff, Cincinnati Specialty Underwriters Insurance Company prays for a judgment declaring that the Policy provides Cincinnati Specialty Underwriters Insurance Company with no duty to indemnify Uptown Downtown for the damages being sought in the Underlying Lawsuit. Plaintiff further prays for all other relief, general or specific, legal or equitable, to which it may show itself to be justly entitled.

Respectfully submitted,

COX P.L.L.C.

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